SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 745

GABRIELE GIORDANO,

Petitioner,

vs.

THE ASBURY PARK AND OCEAN GROVE BANK, Body Corporate; HARRY N. JOHNSON, Former Sheriff of Monmouth County; THEODORE ROWE, LOUIS STRADA, and WILLIAM R. O'BRIEN, Sheriff of Monmouth County,

Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinions of the Courts Below

The opinion of the trial court will be found reported in 9 N. J. Misc. Reports page 1008. It appears in the record R. (pg. 96).

The opinion of the Court of Errors and Appeals is reported in 135 N. J. Equity page 511 and appears in the record at page 117.

The opinion of the Court of Errors and Appeals denying the motion for reargument is not officially reported and it appears in the record at page 140.

II

Jurisdiction

1. The jurisdiction of the Supreme Court of the United States is invoked under Section 237(b) of the Judicial Code, and under Rule 38, paragraph 5(a) of the Court.

2. The day of the entry of the remittitur and decree of affirmance is October 16th, 1945.

3. The nature of the case and the rulings below bring the case within the jurisdictional provisions of Section 237(b) of the Judicial Code for the following reasons:

(a) The claim of federal constitutional rights in relation to the petitioner's rights to have the property sold in parcels and not in bulk was raised at the original trial (R. 56, 57); it was raised on an application for a rehearing before the trial court (R. 133); it was raised before the New Jersey Court of Errors and Appeals on the application for rehearing and reargument (R. 119); the claims were specifically presented to and denied by the trial court and by the New Jersey Court of Errors and Appeals.

4. The cases believed to sustain the jurisdiction are as follows:

Ballentyne v. *Smith*, 205 U. S. 285;
Graffam v. *Burgess*, 117 U. S. 180;

where the Court held that if the inadequacy of price for real property purchased at an execution sale be so gross as

to shock the conscience or, if in addition to gross inadequacy the purchaser has been guilty of unfairness or has taken under advantage or if more has been sold than necessary to satisfy the execution, the sale will be regarded as fraudulent and void and the party injured will be permitted to redeem the property sold.

Warner v. *Grayson,* 200 U. S. 257,

which establishes that separate parcels should not be sold in their entirety unless the interest of encumbrancers require it.

Slater v. *Maxwell,* 6 Wall. (U. S.) 268,

where the Court held that the sale of an entire tract in one body would vitiate the proceeding if bids could have been obtained upon an offer of part of the property.

III

Statement of the Case

An adequate statement of the case is presented under the heading "A" of the petition for writ of certiorari. In the interest of brevity, the statement is not repeated here.

IV

Specification of Errors

The trial Court and the Court of Errors and Appeals erred in finding and holding that despite the gross inadequacy of price, the sale by the Sheriff under execution of all of the petitioner's property in bulk rather than in parcels and his failure to limit the sale only to so much as would be adequate to satisfy the small judgment, was not in contravention of the provisions of the Fourteenth Amendment and did not deprive the petitioner of his property without due process of law.

V

ARGUMENT

Summary of Argument

Point A. The petitioner was deprived of his property without due process and his rights under the Fourteenth Amendment were contravened by the refusal of the Court to set aside the sale under execution on the ground that the same was invalid due to the conduct of the respondents in selling all of petitioner's separate parcels of property in bulk rather than in parcels, and in failing to sell only so much thereof as would be necessary to satisfy the judgment, coupled with the gross inadequacy of price.

Point A

There seems to be no question and the Court below was satisfied that the execution sale was unconscionable and should have been set aside except for the petitioner's alleged laches (R. 102). The Court was in error in feeling that any laches, if it existed, prevented the Court from giving the petitioner relief. *Burke* v. *Gunther*, 128 N. J. Equity 574, establishes that mere lapse of time does not constitute laches. There must be something more, either loss of evidence or a change of position or that because of the lapse of time, it cannot feel confident of its ability to ascertain the truth.

There is nothing in the record except the fact that there was a delay in time. There was no proof of a change in position on the part of the respondents nor any proof of a loss of evidence by reason of the delay. *Lundy* v. *Seymour*, 55 N. J. Equity, 1 establishes also that mere lapse of time will not constitute laches. The Court further held

> "In this case the complainant's delay in seeking his remedy in equity has been more than fourteen years.

When his tenant wrote him that a man named Seymour owned the property, and that he would not pay the complainant more rent, if he was in the possession of his mental faculties, he was put upon an inquiry which would have disclosed the necessity of this suit. It appears that he was then in Pennsylvania suffering from some mental and physical affliction. What that affliction was does not appear. Whether it did, in fact, incapacitate him, is not shown, save by the opinions of affiants which are not supported by statements of facts. How long the affliction lasted is left obscure. If he possessed capacity to care for his property, his inattention to it has very much the appearance of abandonment of it and a waiver of his remedy in equity. Indeed, upon the case, as he presents it, if it had been made to appear that the delay has been prejudicial to the defendant through change in position loss of proof or other cause, or has obscured the path of the court so as to leave it in uncertainty, I would hesitate to act. But I do not perceive that the delay has caused any substantial detriment."

In this case now before your Honors, the petitioner was confined to a mental institution, a fact which was known to the respondent's attorney.

From earliest times it has been held that properties being sold under execution must be sold in separate parcels if plainly divisible. This has been established by any number of cases in this Court.

Slater v. *Maxwell*, 6 Wall. 268;
Warner v. *Grayson*, 200 U. S. 257;
Ballentyne v. *Smith*, 205 U. S. 285;
Graffam v. *Burgess*, 117 U. S. 180.

This is likewise the law of the State of New Jersey. *Merwin* v. *Smith*, 2 N. J. Equity 195; *Lundy* v. *Seymour*, 55 N. J. Equity 1.

In the case of *Merwin* v. *Smith*, the Court pointed out that the Sheriff had sold, under execution, a considerable

amount of the judgment debtor's properties claimed to be worth $25,000.00 and subject to a mortgage of only $6,000.00. The sale was under an execution for $690.00. The Court said:

> "* * * this wholesale method of disposing of a defendant's property can never be justified upon any other ground than as being the best mode for making it bring the most money. A property may, indeed, be so circumstanced, one part so dependent on the other, as to require a sale in large parcels; *but the general rule is, that it must be sold in different parcels if plainly divisible.* Woods v. Monell, 1 John Ch. Rep. 505; Tiernan v. Wilson, 6 Ibid, 413.
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> "*A defendant in execution has his rights, and his property is not to be sold under disadvantageous circumstances.* In this case, the result of the sale would seem to have been peculiarly unfortunate; for the charge in the bill is plainly made, that the purchaser has boasted that the wood on the premises, for the whole of which he gave, including the incumbrances, less than seven thousand dollars, is worth sixteen thousand dollars."

I respectfully point out the similarity that in this case the defendant bank admitted that it had purchased at the sale at least $8,000.00 in equities in these properties and had paid only $100.00 for it. In fact its total judgment claim was only about $400.00

In the case of *Lundy* v. *Seymour*, 55 N. J. Eq. page 1, the Court set aside and declared improper a sale under a judgment execution where the Sheriff levied upon and sold four (4) separate and distinct parcels of land in bulk. The Court pointed out.

> "The sheriff's conduct, in which the plaintiff's attorney appears to have, at least, acquiesced, remaining as it does unexplained, exhibits an abuse of the discretion which the law vested in him to determine the

quantity of land necessary to be sold, and whether it should be sold in bulk or in parcels. *The land being in detached, independent parcels, each of considerable value, clearly should have been sold in parcels.* Johnson v. Garrett, 1 C. E. Gr. 31; Schilling v. Lintner, 16 Stew. Eq. 444; Holmes v. Steele, 1 Stew Eq. 173; Tiernan v. Wilson, 6 Johns Ch. 411. In the last cited case Chancellor Kent said:

"The very circumstances of advertising and selling the whole supposed interest of the plaintiff in both lots together and for so small a demand, was calculated to excite distrust as to the title and to destroy the value of the sale. It was a perversion of the spirit and policy of the power with which the sheriff was entrusted."

The Court goes on to say

"Here the inadequacy of the price bid for the land, shocking as it does the conscience, in itself is strong evidence of fraud, and when it is coupled with the now apparent abuse of the sheriff's discretion, the complainant's lack of knowledge of the sale, and his subsequent mental enfeeblement, and the subsequent devolution of the title to the property sold upon the wife of the attorney who participated in the unjust sale, it becomes, I think, convincing evidence of fraud. 2 Pom. Eq. Jur. Sec. 927; 1 Story Eq. Jur. 256; Wintermute v. Snyder, 2 Gr. Ch. 489, 496; Gifford v. Thorn, 1 Stock, 702-740; Weber v. Weitling, 3 C. E. Gr. 441; Kloepping v. Stellmacher, 6 C. E. Gr. 328; Phillips v. Pullen, 18 Stew. Eq. 836."

In *Schilling* v. *Lintner,* 43 N. J. Eq. 444, the Court set aside a sale, holding the premises should have been sold in parcels. The Court said:

"Besides this important question, another is presented which raises an insurmountable difficulty in the way of confirming this report. The petitioner insists that it was the duty of the sheriff to sell the land in parcels. The force of this is not resisted by the counsel

of the purchaser. I must conclude, from what was admitted before me, that this was a serious mistake upon the part of the officer, and that, under the practice and the decisions heretofore rendered, upon this ground, if no other, the sale cannot be confirmed. Coxe v. Halsted, 1 Gr. Ch. 311; Merwin v. Smith, 1 Gr. Ch. 182; Johnson v. Garrett, 1 C. E. Gr. 31."

The Court has pointed out that in seeking to set aside a sale of the sheriff, proof of actual fraud is not essential. *Cummins* v. *Little,* 16 N. J. Eq. pg. 48. The Court in this case at page 56 says:

"I accept it as a sound and clear principle, that if a sheriff abuses, to the detriment of subsequent encumbrances or of the defendant in execution, the discretion vested in him by law to make sale under execution, a court of equity will grant relief, although there has been a formal compliance in the conduct of the sale with all the requirements of the statute. *It is not necessary that there should be actual fraud committed or meditated.* The abuse of discretion in the execution of the trust is a constructive fraud, against which equity will relieve.

In arriving at this conclusion, no fraud or improper motive is designed to be imputed to the sheriff. The evidence does not warrant it. The fair presumption, I think, from the evidence is, that the sheriff had no idea of the real value of the interest that he was selling, of the circumstances which surrounded the transaction, or of the effect of the sale upon the rights of the parties interested. Otherwise, it is scarcely credible that, as a right minded man and upright public officer, he would have struck off the property as he did. Nor has any fraudulent motive thus far been imputed to the purchaser. If he attended the sale as he alleges, and purchased the property in good faith, without fraud or dissimulation, for the purpose of protecting his rights, it would not have justified the conduct of the sheriff or sanctioned the validity of the sale."

Conclusion

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers to the end that rights under the Constitution of the United States should be preserved and accordingly that a writ of certiorari should be granted and this Court should review and reverse the decision of the Court of Errors and Appeals of the State of New Jersey.

Respectfully submitted,

HERBERT J. KENDRIK,
Attorney for Petitioner.

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